



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Precise Construction Management

File: B-278144.2

Date: February 24, 1998

Steven E. Otto, Esq., Hillyer & Irwin, for the protester.
Rudy Ledbetter for C.D.M. Construction, Inc., an intervenor.
George N. Brezna, Esq., Paul V. Clay, Esq., Christopher Bellomy, Esq., and
Lis B. Young, Esq., Department of the Navy, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency properly waived as a minor informality a bidder's failure to acknowledge an amendment to a solicitation where the amendment is not material because it did not add any obligations or requirements, and a change in one requirement could have had no more than a negligible effect on price, quantity, quality, or delivery.

DECISION

Precise Construction Management protests an award to C.D.M. Construction, Inc. under invitation for bids (IFB) No. N63387-97-B-5354, issued by the Department of the Navy, Public Works Center, for the replacement of barracks doors at the Marine Corps Recruit Depot, San Diego, California. Precise Construction alleges that CDM's bid is nonresponsive.

We deny the protest.

The agency received 18 bids in response to the IFB. CDM's bid was the lowest at \$295,236 and Precise Construction's bid was second lowest at \$309,500. CDM's bid did not acknowledge amendment No. 0003 to the IFB.¹

Precise Construction protested to our Office that CDM's bid was nonresponsive because the amendment was material. The agency determined that amendment No. 0003 was material and, on October 20, rejected CDM's bid as nonresponsive for failing to acknowledge the amendment. We therefore dismissed Precise

¹CDM had submitted its bid prior to the distribution of amendment No. 0003. After bid opening, CDM advised the agency that it had faxed its acknowledgment of the amendment to the agency before bid opening. The agency's investigation found no evidence that agency had received such an acknowledgment.

Construction's protest as academic. By letter of October 24, CDM protested the rejection of its bid to the Navy.

The agency verbally requested Precise Construction to verify its bid. By letter of November 12, Precise Construction did so. On December 1, the Navy met with Precise Construction, at which time the agency began discussing the issue of the materiality of amendment No. 0003. Precise Construction's representative stated that he was not prepared to discuss the terms of the amendment and requested a meeting at a later date, which was scheduled for December 9.

By letter of December 2 to Precise Construction, the Navy stated that amendment No. 0003 was not material and that CDM's bid would be reinstated; this letter also confirmed the meeting scheduled for December 9. Precise Construction did not attend the meeting on December 9, but rather protested to our Office on December 12.

As a preliminary matter, the Navy requests dismissal of the protest as untimely. The Navy alleges that it first informed the protester on December 1 of the Navy's decision to reinstate CDM's bid, and merely confirmed that decision in its letter of December 2. Since the protest was filed more than 10 days after December 1, the Navy contends that it is untimely.

To be timely, protests not based upon alleged improprieties in a solicitation must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1997). Where doubt exists as to the timing of when a protester first should have known of a basis for protest, we will resolve such doubt in favor of the protester. Med-National, Inc., B-232646, Jan. 12, 1989, 89-1 CPD ¶ 32 at 3.

The protester states that the December 1 meeting was arranged after Precise Construction submitted its bid verification, and that it attended the meeting believing that it was to be a pre-award conference. Although the Navy's December 2 letter indicates that the agency advised Precise Construction during the December 1 meeting of the decision to reinstate CDM's bid, the protester contends that, on December 1, the agency raised the issue of the materiality of amendment No. 0003, but did not state that the agency had decided to reinstate CDM's bid. The protester alleges that it first learned of the agency's decision in the December 2 letter, which the protester received on December 3. The protester contends that it timely filed its protest within 10 days of receiving the letter.

Prior to the agency submitting its report, our Office requested the Navy to submit either minutes of the December 1 meeting or statements recalling the content of that meeting from agency personnel who attended it. The agency has declined to do so. In contrast, the protester's comments on the agency report include a sworn statement from Precise Construction's representative at the meeting, in which he

recalled the content of the meeting and specifically denied that the agency announced its decision to reinstate CDM's bid. Considering these circumstances, we resolve any doubt in favor of the protester and find that the protester first knew or should have known of the agency's reinstatement decision upon receipt of the Navy's December 2 letter. Since the protest was filed within 10 days of the protester's receipt of that letter on December 3, the protest is timely.

Precise Construction alleges that amendment No. 0003 is material because it required all fire doors to have wire glass, required the repositioning of steam and condensate lines at stated locations by approximately 2 feet, and changed the galvanized coating designation from G90 to A60. The protester alleges that CDM's bid is thus nonresponsive for failing to acknowledge a material amendment.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive since, absent such acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. G. R. Sponaugle & Sons, Inc., B-257784, Nov. 7, 1994, 94-2 CPD ¶ 178 at 2. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. Id.; Federal Acquisition Regulation (FAR) § 14.405(d)(2). An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality, or delivery. FAR § 14.405(d)(2); G.R. Sponaugle & Sons, Inc., supra. Here, as explained below, amendment No. 0003 is not material, and thus a bidder's failure to acknowledge it properly could be waived as a minor informality. DeRalco, Inc., 68 Comp. Gen. 349, 351-52 (1989), 89-1 CPD ¶ 327 at 3-4.

Amendment No. 0002, which CDM's bid did acknowledge, stated at item No. 6 that fire doors were required to have "1/4 [inch] thick wire glass" and the other doors were to have "1/4 [inch] thick clear tempered" glass. Amendment No. 0003, which CDM's bid did not acknowledge, at item No. 2, added the following paragraph to section 08110 of the IFB:

2.9 GLAZING

Fire doors to receive clear wire glass and all other doors to receive clear tempered glass.

Since amendment No. 0002 had previously stated this very requirement (with more specificity), amendment No. 0003 added no requirement for glass in the fire doors.

Item No. 4 of amendment No. 0002 added the following pipe relocation requirement to the building layout drawings that were part of the IFB:

NOTE: Relocate the 3 [inch] steam line and 3 [inch] condensate lines that are outside the first floor mechanical rooms so that new doors 105 and 112 at each building open without any obstruction.

Item No. 5 of amendment No. 0003 added the following sentence onto the end of this note:

This repositioning is approximately 2 [feet] away from their present location.

The repositioning requirement stated in amendment No. 0002 was in response to a question raised by a bidder who had attended the site visit and noticed that the steam pipes would interfere with opening certain doors. The note added by amendment No. 0002 clearly stated that bidders were required to relocate the pipes so the doors at the stated locations would "open without any obstruction." The estimated relocation distance added by amendment No. 0003 did not change this obligation, inasmuch as 2 feet is a relocation distance one could reasonably anticipate when considering the unobstructed operation of a swinging door; the protester has not provided evidence to the contrary.²

Finally, amendment No. 0003, item No. 1, changed the galvanized metal coating designation from G90, as originally required by the IFB, to A60. The G90 coating is apparently thicker and more resistant to corrosion than the A60 coating. The impetus for this change was comments received by the agency from suppliers that doors with the G90 coating were difficult to obtain. The agency discussed the coating issue with a representative from the Steel Door Institute, who advised it that using the thicker G90 coating presented more difficulties in the manufacturing process than did the A60 coating, but once manufactured, painted, and installed, there was no discernable difference in the functionality, reliability, maintainability, wear and failure rates, or cost between doors with either coating. The protester has provided no evidence to the contrary.³ We thus conclude that this change had a

²We also note that section 00100, paragraph 1.17 of the IFB states that bidders had the responsibility for ascertaining the conditions affecting the work and were to take whatever other steps may be necessary in order to understand the site conditions which could affect cost.

³The protester submitted a written opinion from its engineering consultant who also concluded that the change in the coatings "has a negligible effect on the contract," and, in fact, that the A60 doors would be easier to paint.

negligible effect on price, quality, quantity, or delivery; if anything, the change represented a relaxation of the specifications.

Since amendment No. 0003 either did not change the existing requirements of the solicitation, or such change was negligible, the Navy properly waived as a minor informality under FAR § 14.405(d)(2), CDM's failure to acknowledge amendment No. 0003. The protester has presented no valid objection to the reinstatement of CDM's bid.

The protest is denied.

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